

IN THE TENNESSEE DEPARTMENT OF EDUCATION

IN RE:

D. S.

[REDACTED] and

[REDACTED]

Petitioners

vs.

Docket No. 04-03

WILLIAMSON COUNTY BOARD
OF EDUCATION,
Respondent

ORDER

PROCEDURAL HISTORY

OFFICE OF LEGAL SERVICES
FEB 17 2004
DIVISION OF
SPECIAL EDUCATION

The petitioners bring this action before the Administrative Law Judge pursuant to the Individuals with Disabilities Education Act, 20 USC 1400 et seq. (the "IDEA" or the "Act"). Congress enacted IDEA to insure that children with disabilities receive a free appropriate public education (FAPE). The state and local educational agencies located within them are required to insure that the children with disabilities receive FAPE and in return the agencies receive federal dollars for use in implementing the various programs for compliance.

The petitioners brought their request for a Due Process Hearing to the Williamson County School System on December 19, 2003. The parents employed counsel and choose not to waive the 45 day statutory period and a hearing was held, beginning on January 30, 2004. At the conclusion of the day on the 24th the parents, by and through counsel, moved for an Order requiring the school system to return their son to the school from which he was suspended and grounded their motion on issues of "stay put." Based upon the reasons for removal as more specifically hereinafter described, the motion was denied. The hearing carried over to February 3, 2004 and at the conclusion of the hearing the parents moved for an immediate ruling and the attorney for the school system requested at least two days for the filing of post hearing memorandum. The parents motion was overruled and each side was given until Thursday, February 5, 2004 to file post hearing memorandum's with the Administrative Law Judge. Subsequently each side requested one additional day which was granted.

FACTUAL HISTORY

The parents request for a due process hearing indicates that they "disagree with manifestation hearing conducted on November 25, 2003".

The student for whom the parameters of IDEA apply, was, at the time of the manifestation determination, certified as Learning Disabled. Subsequent to the infraction which caused the system to remove the student

from the school, but prior to this due process hearing, the student had the additional certification of other health impaired, and specifically ADHD.

On November 24, 2003 there was an incident at Page High School which ultimately resulted in the vehicle of this student being searched and an unlawful controlled substance was found in the vehicle. Immediately the student was brought to the office and the parents were called concerning the necessity of having a manifestation determination so that the system could make a finding as to the proper remedial or disciplinary measures that would entail. The parents arrived at the school system and were accompanied by their private psychologist. At the meeting the purpose of the gathering was established as being to make a determination into whether or not the behavior subject to disciplinary action was a manifestation of this student's disability. Appropriate school personnel attended the meeting and the requisite checklist of questions were reviewed to make the manifestation determination. The school personnel concurred that the behavior was not a manifestation of the learning disability. The parents and their private psychologist disagreed. The parent's psychologist indicated his disagreement with the system's conclusions and based his disapproval on the failure of the IEP to add a certification for ADHD. While there had not been, to this date, any medical personnel who diagnosed ADHD, the psychologist stated this condition was present in the child. The school personnel and the parents discussed this issue and the parents were notified of their rights to an appeal and in addition indicated that in order to certify ADHD the system would need to have a diagnosis from a medical doctor as to that finding.

After the manifestation determination was made the school acted on their zero tolerance policy, as further stated in the student handbook (all of which mirrored State statute), and removed the student from school, sending him to the Alternative Learning Center of Williamson County. The alternative learning center is a multi-agency setting created in a joint and cooperative effort between the Williamson County School System and the Juvenile Court System for Williamson County. The director of the school is funded by the Juvenile Court system and the teachers are employed and under the regulation of the Williamson County School System.

As previously stated, the parents and their psychologist were not in agreement as to the manifestation determination and have since that date failed to accept that their son should be placed in the alternative learning center. In that vain, the parents take the position (in addition to the failure of the manifestation determination) that the alternative learning center does not provide the necessary accommodations in order for that school and the Williamson County School System to comply with Federal and State law in order to insure that their child is receiving FAPE.

Further, the parents believe that their son should not have been removed from Page High School, where he was attending, because the school system could not prove that he had a knowing possession of drugs as provided at CFR 300.520. This regulation states a child may be removed from the educational setting if the "child knowingly possesses or uses illegal drugs or sells solicits.....while at school."

The alleged breach of the zero tolerance policy was investigated on the date of the incident by the assistant principal, the school resource officer (a Williamson County Deputy of 13 years assigned to the Page High School), and several of the teachers. Testimony at the due process hearing favoring the student came from the mother, Mrs. [REDACTED], when she testified that on the date of the occurrence she came to the school campus for an unrelated reason and as she came into the school parking lot, she noticed two boys at the truck of her son. Mrs. [REDACTED] went to her son's truck and noticed that one boy was inside the truck and another one was standing on the outside. She testified that the one on the inside seemed to be laying down and putting something under the seat. She approached the truck and asked the boy what he was doing and he said that he was ill and her son had authorized him to sit in the truck. She further testified that the boy was noticeably high and intoxicated at the time. Mrs. Standifird then related that she went into the school and found her son and did not tell any school official what she had witnessed. She concluded that she did not report this because she was concerned the boy had put something illegal or inappropriate under the seat and she wanted to check it out herself at home. She did state that she had seen and talked to one of her son's teachers when she went into the school. Mrs. [REDACTED] further concurred that she talked with her son about his leaving the campus earlier and cashing a check. She confirmed that he left the campus by looking into

his wallet and finding cash in exchange for the check he had cashed. The exit from campus was discussed between the student and his mother prior to the student leaving for school that day even though it was not an authorized or proper exit from the school grounds.

After Mrs. [REDACTED] left school the boy who had been in the truck came into the building, visibly intoxicated and under the influence. He stated where he had been, thus giving the school reasonable cause to search the truck. Prior to the search, however, the SRO and the assistant principal made contact with the student, here, and he accompanied them to the truck stating that there was nothing in the truck to hide. Once the truck door was opened the SRO found an illegal drugs and smoking pipes in the truck door and asked the student about ownership. The student admitted, at that time, that it was his. Later this student also told the assistant principal and another teacher, separately, that he and the other boy had left campus and smoked the drug and returned. He was also noted as stating that he wouldn't have gotten caught if the other boy and not "got so messed up." It was noted by all parties that the student who is subject to this case did not appear to be under the influence and there was no smell of the drug about him.

Finally, the testimony revealed that the school camera identified this student and the other student, who became high, leaving campus and noted the time when they returned. This corroborates the student's testimony that he left campus without permission or authority and subsequently returned. While the school camera's tape was not viewed at the hearing, the testimony revealed that the film would also show that the truck was occupied by this second student who was also subsequently caught, as was testified to by the mother.

It was on this evidence that the School System determined that a zero tolerance violation had occurred; conducted a manifestation determination; created a behavior plan; added ADHD as an additional certification; transferred the student to the alternative learning center; and held two additional manifestation determinations and behavioral studies at the parent's request, all prior to the hearing on January 30, 2004.

ISSUES

The parents submitted the following issues for hearing:

1. Whether the manifestation determination by the Williamson County School System was correct.
2. Whether the Williamson County School System properly placed the student at the Alternative Learning Center.
3. Was the placement procedurally correct.
4. Whether the Williamson County School System was in error because they did not have, at the time of the alleged offense, the student identified and certified as "other health impaired" and specifically ADHD.
5. Whether the provision of "stay put" should have been invoked and the student been allowed to remain at Page High School pending a determination from the hearing officer.
6. Whether the program and format at the alternative learning center have been such that the present IEP is being implemented.

FINDINGS OF FACT

Upon the testimony of the witnesses the Administrative Law Judge makes the following findings:

1. The student was identified as Learning Disabled and came within the parameters of IDEA on the date drugs were found in his vehicle in the parking lot at Page High School.
2. The additional certification of "other health impaired" specifically ADHD was properly added to the student's certification after a diagnosis by a medical doctor.
3. The student admitted, to no less than two (2) school personnel, that the drugs found in his vehicle were his.
4. The student admitted that he had left campus earlier in the day and was accompanied by another student who was found to be under the influence of an intoxicant.
5. The mother of the student knew that her son had planned to leave the campus on the day of the finding of a controlled substance and she came upon the campus to find an intoxicated student in her son's vehicle but failed to report this to the school personnel.
6. The student, although identified as learning disabled, is not, by any means, a student with a low intellectual capacity. He has an IQ of somewhere between 125-130.
7. The student has generally been truthful with the school personnel and he is a very conversant and articulate student.
8. The student stated to one school official that had it not been for the other student getting high, he, too, would not have gotten caught with drugs in his vehicle.
9. The student was in knowing possession of a controlled substance on school campus in violation of school policy and State statutes. The student was aware of the school policy and state law *concerning* searches of vehicles in the school parking lot.
10. The school conducted an immediate manifestation hearing, even prior to allocating a disciplinary result to the possession of drugs on school grounds.
11. The parents were given notice of the incident and attended the manifestation hearing with their psychologist.
12. The manifestation hearing included a review of the student's educational plan, his certification, his behavior, and all required issues as established for manifestation hearings under the IDEA.
13. The parents and their psychologist disagreed with the manifestation determination on separate grounds. The parents disagreed that their child possessed a controlled substance and the psychologist disagreed that the IEP was adequate in that it did not certify the student with the additional category of ADHD.
14. At the parent's request a second and ultimately 3rd manifestation determination was made after the child was certified as ADHD by a physician and all hearing were in compliance with the parameters for lawful manifestation determinations. The behavior, the possession of drugs, was not a manifestation of either learning disabled or ADHD.
15. This student was of such intellect and articulation that he knew the school and state rules concerning drugs, understood his actions, and planned his exit from campus with a companion. This behavior did not

involve a single decision but included many individual decisions, all toward behavior that was outside the scope of school policy and state law.

16. The student was placed in an alternative educational setting wherein the teachers and director were notified of the student's certification, his IEP, and all accommodations that should be made. The personnel at the alternative setting knew, for example, that the student required additional time for his assignments; he should not be graded on his writing; he should be allowed the opportunity to leave class after 30 minutes of work to go to a more flexible environment, and that he learns by seeing and doing better than rote memorization.

17. The alternative learning center provides FAPE for this student in that:

A. the director followed, interpreted and implemented the student's IEP requirements at the alternative learning center;

B. the student began to function on a level at the alternative learning center that exceeded his accomplishments at Page High School. At Page the student regularly left the classroom after 30 minutes as proscribed by his IEP but at the alternative learning center he was without stress and willing to stay the entire class period.

C. the student completes his assigned tasks and, except for one infraction, remains on the highest level of performance.

D. the fact that the alternative learning center does not provide carpentry class is overcome by the availability of computerized blue print and measurement learning.

18. The school system properly completed a functional behavioral assessment as it relates to the offense and to the additional certification of ADHD.

CONCLUSIONS

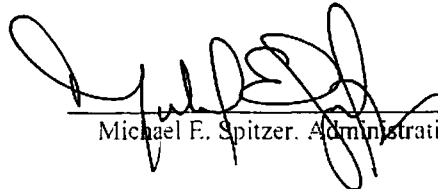
The IDEA has established disciplinary procedures for certified (IDEA) students who have violated school, state, and federal law. The IDEA provides a detailed procedure that the local education agency must follow in order to suspend or expel a student who has been certified as an individual with disabilities. A local education agency may, for example, suspend a student with disability for up to ten (10) days, just as any other student, without providing alternative learning services or accommodations. 20 USC 1415(K)(1)(A)(i) Further, as in this case, if a student brings drugs or weapons to school the IDEA authorizes the school system to remove the student to an alternative setting for up to an additional 45 day period. 20 USC 1415(k)(1)(A)(ii). Beyond this, however, the system may impose their own or state expulsion remedies if the 45 day period is not adequate to the offense, so long as the system provides FAPE to the student who comes within the guidelines of an IDEA student. 20 USC 1415 (k)(5)(A).

In the case of drug possession, as is found here, the system had the right and authority under IDEA to immediately suspend this student without an alternative learning setting for up to ten (10) days. In addition, the Williamson County School System was within their right to suspend for an additional 45 day period with alternative educational services being provided. Finally, if the behavior for which the suspension was given, is of such a nature as to bring into play what is known as a zero tolerance violation, the Williamson County School System was within their right to expel the student for a full year so long as (a) the system determined that the behavior was not a manifestation of the student's disability and (b) provided FAPE to the student while in the alternative educational setting.

In suspending the student for a period of more than ten days the IDEA creates an additional protection which arises out of a so called "change in placement." If there is a change in placement the procedural safeguards require that the parents are given notice, the school system must take such measures as are necessary to insure that the student receives FAPE, and there must be a functional behavioral assessment. 20 USC 1415 (k)(A)(B)

Here the school system followed the procedural requirements for a change of placement and the parents were given each and every right to at their disposal.

UPON THESE FINDINGS AND CONCLUSIONS, it is hereby ORDERED that the parents have failed to meet their burden on the issues presented and the procedure and actions taken by the Williamson County School System are well grounded and upheld.

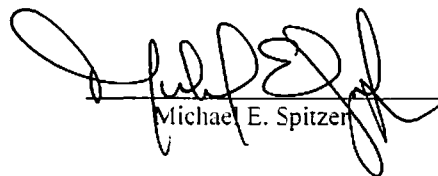


Michael E. Spitzer, Administrative Law Judge

NOTICE OF RIGHT TO APPEAL: Any party aggrieved by the decision herein, has to right to appeal, within thirty (30) days of the entry of this Order with the appeal being to the Chancery Court for the County in which the issues arose or to the Chancery Court for Davidson County, Tennessee or to the Federal District Court for the Middle Section of Tennessee.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and exact copy of the foregoing was provided by facisimile transmission to the attorneys for the petitioner and the respondent by sending the same to them at their address and by hard copy to their office address on this the 7th day of February, 2004. Further the original of this Order is being lodged with the Sate of Tennessee Department of Education on this date as well.



Michael E. Spitzer